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In The

# Supreme Court of the United States

October Term, 1991

ERIC N. PERSON,

*Petitioner,*

v.

LARRY MEACHUM,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

I. ARE THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS PROCEDURALLY BARRED?

II. DOES THE PETITIONER FAIL TO RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW?

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**RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SECOND CIRCUIT COURT OF APPEALS**

The respondent State of Connecticut respectfully requests that this Court deny the petitioner for a writ of certiorari seeking review of the summary order in Person v. Meachum, 90-579, Petitioner's Appendix 3A-6A (hereinafter Pet. App.)

**JURISDICTION**

As is discussed in the argument portions of this brief, infra, the petitioner has failed to demonstrate why his federal claim is not procedurally barred. Thus it is unreviewable under 28 U.S.C. 2254. He also fails to demonstrate that he has raised a substantial federal question in either the state or federal courts. This Court, therefore, is without jurisdiction pursuant to 28 U.S.C. 1254 (1); Supreme Court Rule 10.1(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

**Sixth Amendment**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**Fourteenth Amendment**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATUTORY PROVISIONS INVOLVED

Connecticut General Statutes § 54-86d

**54-86d Disclosure of address or telephone number by victims of sexual assault.**

Any person who has been the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be required to divulge his or her address or telephone number during any trial or pretrial evidentiary hearing arising from the sexual assault or injury or risk of injury to, or impairing of morals of, children; provided the judge presiding over such legal proceeding shall find: (1) Such information is not material to the proceeding, (2) the

identity of the victim has been satisfactorily established, and (3) the current address of the victim is made available to the defense.

Connecticut General Statutes § 54-86e

**54-86e Information re name and address of victim of sexual assault to be confidential.**

The name and address of the victim of a sexual assault under section 53a-70, 53a-70a, 53a-71, 53a-72a, 53a-72b or 53a-73a, or injury or risk of injury, or impairing of morals under section 53-21, or of an attempt thereof, shall not be confidential and shall be disclosed only upon order of the superior court, except that such information shall be available to the accused.

## CONNECTICUT APPELLATE RULES OF PRACTICE

**Practice Book §2000**

**Applicable Sections of Supreme Court Rules**

The practice and procedure for appeals to the appellate court shall conform to the rules of practice governing appeals to the supreme court except where a particular practice or procedure is specified by the rules of the appellate court. All forms and filings specified for use in appeals to the supreme court shall be used in all appeals to the appellate court.

**Practice Book § 4013**

**Filing Appeal--Papers to Be Filed by Appellant and Appellee on Issues, Record, Transcript and Docketing Statement**

(a) At the time the appellant sends a copy of the endorsed appeal form to the chief clerk of the supreme court, the appellant shall also send the chief clerk an original and one copy of the following:

(1) A preliminary statement of the issues intended for presentation on appeal. If any appellee wishes to (A) present for review

alternate grounds upon which the judgment may be affirmed, (B) present for review adverse rulings or decision of the court which should be considered on appeal in the event the appellant is awarded a new trial, or (C) claim that a new trial rather than a directed judgment should be ordered if the appellant is successful on the appeal, that appellee shall file a preliminary statement of issues within fourteen days from the filing of the appellant's preliminary statement of the issues.

Whenever the failure to identify an issue in a preliminary statement of issues prejudices an opposing party, the court may refuse to consider such issue. . . .

(b) Except as otherwise provided, a party may as of right file amendments to the preliminary statement of issues or the designation of the pleadings in the trial court case file at any time until that party's brief is filed. Amendments to the appellant's docketing statement may be filed

at any time. Amendments to the transcript statement may be made only with leave of the supreme court. If leave to file an amendment is granted, the adverse party shall have the right to move for permission to file a supplemental brief and for an extension of time. . . .

**Practice Book § 4065**

**Briefs--Appellant's Brief; Contents**

The appellant's brief shall contain the following:

(a) A concise statement setting forth, in separately numbered paragraphs, without detail or discussion, the principal issue or issues involved in the appeal, with appropriate references to the page or pages of the brief where the issue is discussed, pursuant to subsection (d) hereof. The statement ordinarily should not exceed one page in length and should be on a page by itself. The court may refuse to receive a brief not complying with this requirement.

Such statement shall be deemed in replacement of and shall supersede the preliminary statement of issues.

(b) A table of authorities cited in the brief, with references to the page or pages of the brief where the citations to those authorities appear.

## OPINIONS BELOW

The summary order of the Second Circuit Court of Appeals appears in the petitioner's appendix at pages 3A-6A. The district court's opinion denying the petition is reported as Person v. Meachum, 772 F. Supp. 69 (D. Conn. 1991). It is reprinted in memorandum form, in Petitioner's Appendix 8A-44A. The Connecticut Appellate Court's ruling on this issue is reported in State v. Person, 20 Conn App. 115, 564 A. 2d 626 (1989) (Person I), and is reprinted in the Petitioner's Appendix 61A-81A.

## STATEMENT OF THE CASE

The Connecticut Appellate Court set forth the following history of the petitioner's case:

> The [petitioner] was arrested and charged with one count of sexual assault in the fourth degree; [Connecticut] General Statutes § 53a-73a(a)(1)(D); and one count of risk of injury to a child; [Connecticut] General Statutes § 53-21 in connection with certain sexual acts allegedly perpetrated against his older daughter. He was tried to a jury on these charges, along with the charges of risk of injury to a child and sexual assault in the second degree [Connecticut General Statutes § 53a-71(a)(1)] related to offenses involving his younger daughter, age eight at the time of the trial. He was

acquitted of the crimes involving the older daughter, but was convicted of the two crimes involving the younger daughter[1] (the victim).

The [petitioner] and the victim's mother were divorced in June, 1981. Subsequent to the divorce, the victim visited the [petitioner] on weekends at his apartment in Danbury [CT]. At trial, the victim stated that during these visits the [petitioner] would take her into his bedroom and engage in a number of sexual acts with her.

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[1]. Under Connecticut General Statutes § 54-83e it is improper to divulge the name and address of a sexual assault victim. The petitioner, however, has repeatedly published the names of both victims throughout his petition. Moreover, he has published the name of the witness (LA) whose testimony is at issue in this petition. LA was also the victim of an alleged sexual assault. The respondent requests this Court to seal the petition and honor Connecticut's confidentiality laws which are similar in form and purpose to 18 U.S.C. §3509 (4)(1)-(3). Both, lower courts honored similar requests after petitioner published the victims' names in his filings below. All court's deciding this case have managed to do so without identifying the victim.

> The victim described these acts very specifically, in graphic detail.

State v. Person, Pet. App. 63A-64A (footnotes omitted).

This "graphic detail" included the victim's ability "'to describe a physical ejaculation, the feel of seman [sic], its color, in a way nobody could except if it happened to them.' Tr. (January 26, 1988) at 25." Person v. Meachum, Pet App. at 37A-38A (District Court Opinion quoting the trial court judge).

At trial, the petitioner subpoenaed the victim's best friend LA to testify in his defense. LA had lodged a similar complaint against her father. Person I Pet. App. at 72A. Trial Counsel sought LA's testimony to determine whether the victim gained her detailed knowledge of sexual activity from LA's account of her own sexual assault. Person I Pet. App. 72A. This proffer was to "buttress" the petitioner's previously admitted evidence that the victim learned

about sexual activity when she watched the Playboy Channel at her grandparent's home. He also wanted to determine whether these two young girls were jointly fantasizing these events. Person I, Pet. App. 72.

The trial court ruled that, for the purposes offered, LA's testimony was irrelevant. Id. 73A. The court also relied on Connecticut General Statutes § 54-86d and 54-86e to hold that revelation of LA's victimization would violate those statutes. Id. note 5. However, the trial court did allow LA to be examined about any discussion she had with the victim regarding the victim's complaint. Person I, Pet. App. 126. The defendant did not call the victim to testify on this issue.

**CONNECTICUT APPELLATE PROCEEDINGS**

The Connecticut Appellate Court identified the petitioner's trial court claim as follows:

> that because the victim and her friend made similar complaints against their fathers, the jury should have been made aware of this fact for the purpose of weighing the credibility of the victim.

Person I supra at Pet. App. 73A. It went on to reject this evidentiary claim holding that the defendant provided no "logical link" between LA's complaint and the victim's assault which would prove that the victim's testimony was unreliable. Person I, Pet. App. 74A. The defendant failed to support his proffered reason for examining LA with any showing that it would undermine the accuracy of the victim's testimony. Id. The Appellate Court refused, however, to review any federal constitutional claims regarding this issue, ruling instead that they were procedurally barred because they were asserted for the first time in the petitioner's reply brief, and were inadequately briefed. Person I, Pet App.

73A-74A n. 5. The Connecticut Supreme Court refused to grant certification on this claim. see State v. Person, 213 Conn. 811, 568 A. 2d 796 (1990).

**FEDERAL HABEAS CORPUS PROCEEDINGS**

In his District Court writ, the petitioner asserted that the failure to admit LA's testimony violated both the compulsory process and due process clauses of the United State's Constitution. Pet. App. 13A to 14A. Reviewing the merits of this claim, the District Court agreed with the Connecticut Appellate Court and ruled that LA's testimony was "irrelevant and immaterial" and "arguably privileged under Connecticut Shield laws" . Person v. Meachum, Pet. App. 35A, 38A. Petitioner's constitutional claims were rejected. Id.

The Second Circuit "assumed" that the instant federal claim was not forfeited due the petitioner's failure to brief them in the Connecticut Appellate Court. Person v. Meachum, Pet. App. 5A. It also believed that

the evidence was admissible for the purpose offered, but its exclusion was not a constitutional violation. Id. 5A-6A.

## REASONS FOR DENYING THE WRIT

### I. THE PETITIONER'S FEDERAL CONSTITUTIONAL CLAIMS ARE PROCEDURALLY BARRED

This Court has ruled that federal court's are not empowered to review decisions of a state court that rests on "independent" state law grounds that are adequate for sustaining the decision. Harris v. Reed, 489 U.S. 255, 256, 261 (1989). Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground for barring review. Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978). All that is required from a state court decision enforcing its procedures is a "plain statement" that a claim is procedurally barred. Harris v. Reed, 489 U.S. at 261.

In this case, the Connecticut Appellate Court refused to grant review of the

petitioner's federal claims because they were raised for the first time in his reply brief, and were inadequately briefed. Person I, Pet. App.73A-74A n. 5. This unequivocal ruling is a plain statement of procedural bar within the holding of Harris v. Reed. Certiorari should not be granted for this claim because it was not preserved pursuant to state procedures. Ellis v. Dixon, 349 U.S. 458, 464 (1955).

The district court ruled, however, that the mere citation to one United States Supreme Court case[2] in the petitioner's appellate court reply brief, was sufficient to preserve his federal claims for collateral review. Pet. App. 33A.[3] The

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[2]. Washington v. Texas, 388 U.S. 14, 19 (1967). Pet. Appellate Court reply brief at p.11.

[3]. The district court held, "Even a cursory review of the petitioner's reply memorandum to the Appellate Court reveals he indicated the federal nature of his claim, thereby preserving his right to raise it in a petition for habeas corpus." Person v. Meachum, Pet. App. 33a-34A, n. 4.

district court, however, is not the proper authority for determining whether the petitioner complied with Connecticut appellate practice. State court's are the final arbiter of their own rules of practice.

Indeed, the district court's decision explicitly reversed the Connecticut Court's ruling that it will not review new claims raised for the first time in a reply brief. Person I Pet. App. 74A. n. 5. It is well established, however, that a Connecticut Appellant must raise all his legal issues, and thoroughly brief them in his original brief, in order to gain appellate review. Herbert v. Manson, 199 Conn. 143, 144. n. 2, 506 A. 2d 98 (1986); State v. Mack, 197 Conn. 629, 632, 500 A. 2d 1303 (1985); State v. Sitka, 11 Conn. App. 342, 343, 527 A. 2d 265 (1987). Even a constitutional issue is waived when it is not raised in an original brief, or is insufficiently briefed. State v. Redente, 19 Conn. App. 521, 531 n. 5. 563

A. 2d 1365, 1370 (1989). Moreover, Connecticut Court's will not review a claim when an appellant merely cites a case or constitutional amendment but does not provide any analysis as to its applicability. Commissioner v. Youth Challenge of Greater Hartford,Inc., 206 Conn. 316, 537 A. 2d 480 (1988)(mere listing of cases without analysis is not sufficient briefing); State v. Burroughs, 22 Conn. App. 507, 514-15, 578 A. 2d 146 (1990) ("Assignments of error, including constitutional errors, that are merely mentioned but not briefed beyond a statement of the claim will be deemed abandoned and will not be reviewed by this court."). Where application of these rules is uniform and well established, federal courts must enforce the procedural bar which results. Francois v.Wainwright, 741 F. 2d 1275, 1281 (11th Cir. 1984).

It is noteworthy that, in seeking to invoke the Court's discretionary review,

the petitioner wholly misstates the issue presented to the state Appellate Court. According to the petitioner, the Appellate Court was asked to consider whether:

> (1) Defendant was denied his right to present a defense and his right to confrontation when the trial court refused to allow the defendant to present evidence that the child complainant's best friend had accused her own father of the conduct father of conduct very similar to the conduct allegedly committed by the defendant. Pet. at 5.

However, the issue, as framed above, does not appear anywhere in the statement of issues presented to the Connecticut Appellate Court.

Under Connecticut Practice Book rules, an appellant's final statement of issues is the issue page at the beginning of his brief. Practice Book § 4013(b). The

petitioner's statement of issues in the Appellate Court reads:

> Did the court erred in prohibiting the defendant from questioning the victim's best friend concerning her complaint that her father sexually assaulted Her?

Petitioner's Appellate Court Statement of Issues p. i. There is no reference to the compulsory process clause the confrontation clause or the due process clause in that declaration.

Similarly, the petitioner's restatement of the issue in his reply brief makes no mention of any federal constitutional claim whatsoever. Petitioner's Appellate Court Reply Brief. p. i.

In addition, Connecticut court's require, as does this Court, a table of authorities relied upon in a party's brief. Connecticut Practice Book § 4065 (b). The tables of authorities in both the petitioner's main brief and reply brief are bereft of any

mention of either the Sixth Amendment or the Due Process clause of the Fourteenth Amendment. Pet. Appellate Court Table of Authorities vii; Reply brief table of authorities p. ii. The only fleeting reference to a federal claim regarding this issues is in the reply brief and is contained in a one sentence quote from Washington v. Texas on the effect of excluding evidence proffered by a defendant. Petitioner's reply brief at 11. See Person v. Meachum Pet. App. 33A -34A note 4. Up until this point, and thereafter, the petitioner arqued this issue as a state evidentiary claim.

It was from this one sentence that the district court gleaned preservation. However, it was also from this one sentence that the Appellate Court ruled that the claim was abandoned for failure to comply with Connecticut's briefing requirements. This "plain statement" of procedural default divest federal court's of jurisdiction to

consider the petition unless the petitioner proves both cause and prejudice. Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

Petitioner alleges neither cause for failing to raise his federal claims below, or substantial prejudice which justifies relaxing the procedural bar rule. Therefore, certiorari should be denied. Ellis v. Dixon, 349 U.S. at 464.[4]

## II. THE PETITIONER DOES NOT RAISE A SUBSTANTIAL FEDERAL CLAIM WORTHY OF THIS COURT'S REVIEW

### A) The Petitioner's Alleged Due Process Claim Is Unworthy Of Certiorari

Again in this Court, petitioner argues that the evidentiary ruling of the trial court violated his due process rights. The standard he applies is derived from this court's rulings regarding the government's failure to disclose exculpatory evidence.

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[4]. The petitioner did not raise the instant federal constitutional claim as part of his direct appeal to this court. Person v. Connecticut, U.S. , 111 S. Ct. 756 (1991).

Pet. at 13 citing United States v. Agurs, 427 U.S. 97 (1976) (whether the suppressed evidence creates a reasonable doubt that did not otherwise exist).

As respondent has argued, however, a petitioner on collateral review has a much higher burden than an appellant on direct appeal. United States v. Addonizio, 442 U.S. 178, 184 (1979) ("an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment"). Therefore, the proper standard for elevating an evidentiary ruling to a due process violation subject to collateral review, must be higher. Collateral review of this type of claim should serve as an additional safeguard "against compelling an innocent man to suffer an unconstitutional loss of liberty." Stone v. Powell, 429 U.S. 465, 491, (1976); see also Kuhlman v. Wilson, 477 U.S. 436, 454 (1986) (standard for repetitive petitions should be actual innocence). Thus

petitioner's actual innocence must be implicated by the excluded evidence.[5]

The petitioner alleges that a jury might have had a reasonable doubt if LA's testimony were allowed. This allegation alone is insufficient to elevate an evidentiary ruling to a constitutional violation under the general rubric of the due process clause. For this reason alone, the petitioner does not present a substantial federal question.

**B. LA's Proffered Evidence Was Properly Excluded**

This Court has held that a defendant's right to call a witness and present evidence is not unlimited, but must comply with established rules of evidence. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). LA's testimony was excludable because it would have exposed her to identification, in

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[5]. Neither the district court nor the Court of Appeals adopted the "actual innocence" standard for due process claims proposed by the respondent, yet both courts rejected the due process claim.

violation of Connecticut General Statutes § 54-86e. It should also be noted that LA was provided with added protection when she testified against her own father under Connecticut General Statutes § 54-86(g); because she would have been traumatized by public testimony. T 11/24/87 at 23-24. States have a legitimate interest in shielding child victims of sexual assault from exposure caused by their victimization. Michigan v. Lucas, ___ U.S. ___, 111 S. Ct. 1743 (1991); Maryland v. Craig, ___ U.S. _, 110 S. Ct. 3157, 3170 (1990). With these interests joined, the trial court had to determine the relevance and importance of LA's testimony to the defense.

Two theories were proffered for the admission of LA's testimony. First, it would show that the victim learned about explicit sexual conduct from a source other than the defendant. Person I, Pet. App. 72A. When offering this evidence, however, trial counsel admitted that it merely "bolstered"

Playboy channel. There is no compulsory process violation when a trial court excludes cumulative evidence. See Jackson v. Garrison, 677 F. 2d 371, 374 (4th Cir. 1981).

Moreover, petitioner's own offer indicated that LA was wholly unable to educate this victim on the "graphic details" about ejaculation and the nature of ejaculate which pervaded the victim's testimony. The very affidavit used to support the proffer indicated that "[LA] did not have any concept of ejaculation." Pet. App. 87A. LA's testimony, therefore, did not support the petitioner's theory. Second, the petitioner argued that LA's testimony was relevant to show that both victim's fabricated and fantasized these incidents. He never established any "logical link", however, between two complaints by friends and any theory that this established fabrication. Person I, Pet. App. 74A; Person

v. Meachum, Pet. App. 35A. Thus, the proffer did not support the theories presented to the trial court to a degree necessary to overcome the important protections afforded LA by Connecticut's statutory scheme.

That the Court of Appeals concluded differently in its materiality determination is merely its view that it might have exercised its discretion differently on the evidentiary issue presented, and does not mean that LA's testimony was constitutionally required. Person v. Meachum, Pet. App. 5A-6A (LA's testimony arguable basis for impeaching victim).

The trial court, however, was faced with the offer as presented at trial, and not with the honed version of the argument that has evolved since that time.[6] Moreover, the

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[6]. Petitioner cites several cases that discuss the relevance of childhood fantasies. Pet. at 16. These cases may have made the proffer arguably admissible to the Second Circuit but were critically lacking in the trial court.

of requiring testimony of a child/victim solely to provide the petitioner with what the Court of Appeals acknowledged as only "arguable" impeachment evidence. Nothing in either Washington v. Texas, or Chambers v. Mississippi, constitutionally compels admitting such evidence.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Second Circuit Court of Appeals should be denied.

Respectfully Submitted,

STATE OF CONNECTICUT

By: _____

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Appellate Unit
Office of the Chief
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June, 1992